

# THE SUPERIORITY REQUIREMENT OF RULE 23(b)(3) IN CLASS ACTIONS UNDER THE TRUTH IN LENDING ACT

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## I. INTRODUCTION

The 1966 amendment of Federal Rule of Civil Procedure 23 and the 1968 enactment of the Truth in Lending Act helped to set off a litigation explosion by bringing thousands of new claims into the federal courts. Most such claims were asserted under subdivision (b)(3) of the rule, which is its most controversial part. That subdivision was intended to achieve economies of time, effort and expense and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or due process.

It is a condition to the applicability of subdivision (b)(3) that the court find it superior to other available methods for the fair and efficient adjudication of a controversy. In Truth in Lending cases the incentives written into the statute offer some available alternatives to the class action. Injunctive relief under rule 23(b)(1) or (b)(2) and the test case procedure have some judicial support. Prior to the 1974 amendment of the Truth in Lending Act, judicial decisions were negating (b)(3) class action treatment of Truth in Lending cases because of defendants' unlimited exposure to indeterminate liability. The amendment has substantially reduced that exposure.

This article examines the history of Truth in Lending class action litigation, the objectives of the civil rule and the statute, the litigation trends antedating the statute's amendment, the effect of the amendment, the superiority condition, and the alternative remedies in Truth in Lending cases. The article concludes that the rule (b)(3) class action is an unlikely method of obtaining judicial fairness and economy in most Truth in Lending cases.

## II. THE 1966 AMENDMENT OF RULE 23

When rule 23 was amended in 1966, the rulemakers attempted to substitute a more functional approach for the somewhat abstract concepts of the original rule. They expected that the flexible proce-

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ture built into the amended rule would "provide a very real saving in terms of the burden of litigation."<sup>1</sup> Some of the changes were challenging and innovative. The new rule was a broad outline of policies and directions, and it confided a broad range of discretion to district judges.<sup>2</sup>

The old rule gave little guidance to the courts in deciding which of the three types of class actions—true, hybrid or spurious—should apply to a given case. The amended rule, as it was interpreted by the Supreme Court's Advisory Committee,<sup>3</sup> spelled out the prerequisites for maintaining any class action.<sup>4</sup> Then, in separate subdivisions, it delineated additional requirements intended to assist courts in recognizing the three types of class actions to which they were applicable.<sup>5</sup>

Rule 23(b)(3) was intended to encompass those cases "in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."<sup>6</sup> Some said its mission was "taking care of the smaller guy."<sup>7</sup> This rule is based on the assumption that "class action disposition of multiple similar claims, especially small consumer claims, is socially desirable."<sup>8</sup> It is the part of the amended rule into which the "spurious" class actions were meant to fall,<sup>9</sup> and it made some important changes, not the least of which was that members of the class were to be bound by the judgment, either for or against them, unless they took affirmative action to be dropped or excluded from the class.<sup>10</sup>

Rule 23(b)(3) includes a provision that the court must find, *inter alia*, "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This provision

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<sup>1</sup> Address of Prof. Charles Alan Wright in *Proceedings of the Twenty-Ninth Judicial Conference of the Third Judicial Circuit*, 42 F.R.D. 437, 567 (Sept. 9, 1966).

<sup>2</sup> Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967).

<sup>3</sup> *Advisory Committee's Notes to Proposed Rule 23 of the Federal Rules of Civil Procedure*, 39 F.R.D. 98 (1966) [hereinafter cited as *Advisory Comm. Note*].

<sup>4</sup> FED. R. CIV. P. 23(a).

<sup>5</sup> FED. R. CIV. P. 23(b)(1), (2) and (3).

<sup>6</sup> *Advisory Comm. Note*, 39 F.R.D. at 102-03.

<sup>7</sup> Report of conversation with Prof. Benjamin Kaplan contained in Frankel, *Amended Rule 23 From A Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966).

<sup>8</sup> *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 759 (3d Cir. 1973).

<sup>9</sup> Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967).

<sup>10</sup> *Id.* at 45.

is the *sine qua non* of the subdivision and was intended to "reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy."<sup>11</sup> One guideline provided in the rule to assist the court in determining this question of superiority is "the difficulties likely to be encountered in the management of a class action."<sup>12</sup>

The amendment of rule 23 acted as an inducement for the commencement of some very large class actions, many of which fell into the rule 23(b)(3) category. *Philadelphia v. American Oil Co.*,<sup>13</sup> commenced November 7, 1967, was one of the largest of the early actions under the amended rule. Two others were *Illinois v. Harper and Row Publishers, Inc.*,<sup>14</sup> and, of course, *Eisen v. Carlisle & Jacquelin*,<sup>15</sup> discussed later. Court after court was called upon to determine the superiority question presented by the rule. While various approaches were taken, a practical view was that of the Second Circuit, which stated that the trial judge would have to face this problem in a realistic way. The court ruled that the trial judge should be afforded the greatest latitude in the exercise of his judgment after a careful factual exploration as to how this result could be obtained.<sup>16</sup> An early decision of the Tenth Circuit<sup>17</sup> was widely interpreted as justifying and encouraging a liberal attitude toward class action treatment of such cases.

### III. THE TRUTH IN LENDING ACT

#### A. *Reasons for the Legislation*

In this climate the Truth in Lending Act<sup>18</sup> was passed in 1968. From the end of World War II through 1967 the amount of credit outstanding to consumers in the American market had increased from 5.6 billion dollars to 95.9 billion dollars, a rate of growth more than four and one-half times as great as that of the economy.<sup>19</sup> Hear-

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<sup>11</sup> *Advisory Comm. Note*, 39 F.R.D. at 103.

<sup>12</sup> FED. R. CIV. P. 23(b)(3)(D).

<sup>13</sup> 53 F.R.D. 45 (D.N.J. 1971).

<sup>14</sup> 301 F. Supp. 484 (N.D. Ill. 1969).

<sup>15</sup> 41 F.R.D. 147 (S.D. N.Y. 1966). See also *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972); *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532 (S.D. N.Y. 1971).

<sup>16</sup> *City of New York v. International Pipe and Ceramics Corp.*, 410 F.2d 295, 300 (2d Cir. 1969).

<sup>17</sup> *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968).

<sup>18</sup> 15 U.S.C. § 1601 *et seq.* (1974).

<sup>19</sup> H.R. REP. NO. 1040, 90th Cong., 1st Sess. 10-11 (1967).

ings conducted during several years of congressional study and debate revealed that consumers were remarkably ignorant of the nature of their credit obligations and of the costs of deferring payment.<sup>20</sup> The Truth in Lending Act was designed to remedy the problems which had developed.<sup>21</sup> Its stated purpose is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."<sup>22</sup> The specific aim of the law was to put a simple price tag on credit so that the consumer might be enabled to comparison shop in credit transactions by looking at the annual percentage rate.<sup>23</sup>

The principal purpose of the Act is to make certain that a buyer in a consumer credit transaction can have accurate information of his cost for the credit extended to him. Such a transaction is defined as "one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household or agricultural purposes."<sup>24</sup>

In computing the cost of credit, the term "finance charge" is defined as the sum of all charges payable by the borrower and imposed by the creditor as an incident to the extension of credit.<sup>25</sup> The finance charge is the basis for determining the annual percentage rate,<sup>26</sup> which is computed by an actuarial method or a comparable alternative method approved by the Federal Reserve Board.<sup>27</sup> The results of those computations and other relevant aspects of the consumer credit transaction must be disclosed.<sup>28</sup>

Much of the litigation arising under the Truth in Lending Act has resulted from the application of § 130,<sup>29</sup> which, as originally enacted, permitted the borrower to recover from the creditor for failure to make such disclosure an amount equal to twice the amount of the finance charge, but not less than \$100 nor more than \$1,000,<sup>30</sup>

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<sup>20</sup> *Id.* at 13; S. REP. NO. 392, 90th Cong., 1st Sess. 2-3 (1967).

<sup>21</sup> *Mourning v. Family Publications Service*, 411 U.S. 356, 364 (1973).

<sup>22</sup> 15 U.S.C. § 1601 (1974).

<sup>23</sup> H.R. Rep. No. 1040, 90th Cong., 2d Sess. (1968).

<sup>24</sup> 15 U.S.C. § 1602(h) (1969).

<sup>25</sup> 15 U.S.C. § 1605(a) (1969).

<sup>26</sup> 15 U.S.C. § 1606 (1969).

<sup>27</sup> Regulation Z, Board of Governors of the Federal Reserve System, 12 C.F.R. § 226.5(c) (1975), prescribed pursuant to 15 U.S.C. § 1604 (1968).

<sup>28</sup> 15 U.S.C. § 1631 (1974) and Regulation Z, *supra* note 27.

<sup>29</sup> 15 U.S.C. § 1640 (1974).

<sup>30</sup> 15 U.S.C. § 1640(a)(1) (1974).

plus the costs of the action and a reasonable attorney's fee as determined by the court.<sup>31</sup>

### B. *Class Action Litigation*

The enactment of the Truth in Lending Act encouraged a great deal of litigation. By November 1973, more than 139 Truth in Lending cases were reported.<sup>32</sup> Many of these cases resulted from the operation of bank credit card systems, which had achieved significant market impact since BankAmericard was introduced in 1959 followed by Master Charge in 1967. Class action status was sought in most cases.

The Ninth Circuit stated in December, 1973, that the "clear trend of authority" was that class actions were inappropriate in Truth in Lending actions,<sup>33</sup> but virtually every court that denied class action status in a Truth in Lending case took pains to point out that nothing in the congressional history or language of the Act justified a conclusion that class actions under the Act were prohibited.<sup>34</sup> The Tenth Circuit determined that there was nothing in the Truth in Lending Act itself, in rule 23, or in the notes of the Advisory Committee that expressly precluded class actions in this type of case.<sup>35</sup> The court surveyed the legislative history of the Act and found that it threw scant light on the problem.<sup>36</sup> It concluded that to "find any congressional intent to preclude at all events treatment of such cases under Rule 23 would be a work of clairvoyance and not of construction or interpretation."<sup>37</sup>

### C. *Applicability of Subdivision (b)(3)*

As the flood of Truth in Lending class actions increased, a consensus developed among the courts that subdivision (b)(3) was the only part of rule 23 that was appropriate to the maintenance of such actions.<sup>38</sup> This subdivision was intended to prevent multiple relitiga-

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<sup>31</sup> 15 U.S.C. § 1640(a)(2) (1974).

<sup>32</sup> See Appendix, *Reported Truth in Lending Cases*, 29 BUS. LAW. 201 (1973).

<sup>33</sup> *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467-68 n.17 (9th Cir. 1973). See also *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 763 n.9 (3d Cir. 1974).

<sup>34</sup> E.g., *Kristiansen v. John Mullins & Sons, Inc.*, 59 F.R.D. 99 (E.D. N.Y. 1973). See also *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974).

<sup>35</sup> *Wilcox v. Commerce Bank*, 474 F.2d 336, 343 (10th Cir. 1973).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 344.

<sup>38</sup> See, e.g., *Goldman v. First Nat'l Bank*, 56 F.R.D. 587, 590 (N.D. Ill. 1972); *Rodriguez*

tion of the factual and legal issues as to a defendant's liability.<sup>39</sup> Professor Benjamin Kaplan has written that "[t]he object is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party."<sup>40</sup>

Such a characterization of subdivision (b)(3) made it appear attractive as the vehicle for Truth in Lending class actions, and class action status was certified in several such cases.<sup>41</sup> Concurrently, however, warnings were raised in respect of the binding effect of judgments in such actions on nonparticipating members of the class. Judge Marvin E. Frankel wrote of rule 23(b)(3): "The central change for this formerly 'spurious' sort of action is that it is no longer simply a form of 'permissive joinder' device. The amended rule goes far in the direction of making the result of the common questions binding for all members of the class."<sup>42</sup> To the same effect was the observation of Chief Judge Anthony T. Augelli: "Because absent class members will be bound by this Court's decision unless they take affirmative steps to be excluded from the class, the Court must carefully decide whether the requirements set forth in Rule 23(a) and (b)(3) are met."<sup>43</sup>

#### IV. RATNER V. CHEMICAL BANK NEW YORK TRUST COMPANY

Until the decision of Judge Frankel in February, 1972, in *Ratner v. Chemical Bank New York Trust Co.*,<sup>44</sup> some trial courts were

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v. Family Publications Service, Inc., 57 F.R.D. 189, 192 (C.D. Cal. 1972); *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89, 91 (N.D. Cal. 1972).

<sup>39</sup> *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 759 (3d Cir. 1973).

<sup>40</sup> Kaplan, *Continuing Work of the Civil Committee, 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 390 (1967).

<sup>41</sup> E.g., *La Mar v. H & B Novelty & Loan Co.*, 55 F.R.D. 22 (D. Ore. 1972), *aff'd* 489 F.2d 461 (9th Cir. 1973); *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1166 (D. Ala. 1971), *rev'd on other grounds*, 469 F.2d 453 (9th Cir. 1972); *Joseph v. Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D. Mo. 1971); *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532 (S.D. N.Y. 1971); *Katz v. Carte Blanche Corp.*, 52 F.R.D. 510, 53 F.R.D. 539 (W.D. Pa. 1971), *rev'd on rehearing en banc*, 496 F.2d 747 (3d Cir. 1974); *Berkman v. Westinghouse Elec. Corp.*, 4 CCH Consumer Cred. Guide ¶ 99,270 (N.D. Ill. 1971).

<sup>42</sup> Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967).

<sup>43</sup> *Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 51, (D.N.J. 1971). Obviously, there are limitations in any case upon the extent to which absent parties will be concluded. See Frankel, *supra* note 22, at 46-53.

<sup>44</sup> 54 F.R.D. 412 (S.D. N.Y. 1972).

guided by the concept that rule 23 should provide a remedy for anyone whose claim was too small to justify individual litigation and who would otherwise not be involved in judicial proceedings.<sup>45</sup> The *Ratner* decision was a definite rejection of that interpretation.

Ratner sued the bank for himself and as representative of others similarly situated who held Master Charge credit cards by which open end accounts were created.<sup>46</sup> He alleged that for the monthly period ended September 16, 1969, the periodic statement sent to him by the bank disclosed that his indebtedness prior to that monthly period had been paid and had given rise to no finance charge; that during that monthly period he had incurred new indebtedness of \$191.58 for purchases then made; that no finance charges thereon would be incurred if paid in full in twenty-five days from bill date; and that a minimum payment of \$10.00 within twenty-five days would be sufficient to avoid delinquency. The statement did not disclose any annual percentage rate, as required by the Truth in Lending Act and the implementing regulation.<sup>47</sup> Ratner paid \$10.00 and, on his next statement, was billed for a finance charge. His ultimate contention, in the language of his complaint, was that "[d]efendant's monthly statement to plaintiff in September, 1969, violated the Act and the implementing Regulation, 12 C.F.R. § 226.7, in that it failed to disclose the annual percentage rate or the nominal annual percentage rate."<sup>48</sup> By agreement, the case was first submitted to the court on Ratner's motion for summary judgment and defendant's motion to dismiss. In granting the motion for summary judgment, the court withheld final judgment pending disposition of the class action question,<sup>49</sup> which had been held in abeyance.

Eight months later, Judge Frankel handed down his seminal decision<sup>50</sup> that the suit should not be maintained as a class action.<sup>51</sup> This ruling has been described as the "most commonly cited and influential decision in which the maintenance of a class action has been denied."<sup>52</sup> It has been cited in more than sixty reported decisions

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<sup>45</sup> Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 376 and citations in n.8 (1972).

<sup>46</sup> 15 U.S.C. § 1602(i) (1970).

<sup>47</sup> *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 274 (S.D. N.Y. 1971).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 282.

<sup>50</sup> See *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974).

<sup>51</sup> 54 F.R.D. 412 (S.D. N.Y. 1972).

<sup>52</sup> Steele, *The Availability and Utilization of the Class Action Remedy Under the "Truth-in-Lending" Law*, 66 F.R.D. 323, 336 (1974).

to date, most of which chant the same litany "that a class action should not lie because . . . an award of the statutory penalty of \$100 for each class member would defeat the purpose of the Truth in Lending Act . . . [and] threaten the solvency of the . . . [defendant] because the statutory penalty would greatly exceed potential actual damages."<sup>53</sup>

Judge Frankel, a student of amended rule 23,<sup>54</sup> recognized that "its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature."<sup>55</sup> To that end, he summarized the points upon which he based his conclusion, including the following:

(1) Plaintiff probably suffered no damages but, at most, he may have been damaged in some amount less than \$2.00;

(2) As many as 130,000 Master Charge credit card holders could have asserted the claim upon which plaintiff brought the suit. At the minimum rate of \$100 apiece, this class would be entitled to a recovery in the range of \$13,000,000;

(3) No other member of the class had evinced an interest in the lawsuit or brought a similar suit elsewhere;

(4) The one-year limitation period in the Truth in Lending Act had long since expired;<sup>56</sup>

(5) If plaintiff prevailed, he would recover \$100 plus attorneys' fees of approximately \$20,000 (as agreed between the parties).<sup>57</sup>

On those premises, Judge Frankel held it was "not fairly possible in the circumstances of this case to find the (b)(3) form of class action 'superior to' this specifically 'available' [method] for the fair and efficient adjudication of the controversy."<sup>58</sup> Accordingly, he accepted the bank's contention that:

. . . the proposed recovery of \$100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to

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<sup>53</sup> *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 770, (Aldisert, J., dissenting) (3d Cir. 1974).

<sup>54</sup> *E.g.*, Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967).

<sup>55</sup> *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 (S.D. N.Y. 1972).

<sup>56</sup> 15 U.S.C. § 1640(e) (1974); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 460-61 (E.D. Pa. 1968).

<sup>57</sup> *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 413-14 (S.D. N.Y. 1972).

<sup>58</sup> *Id.* at 416.



defendant, for what is at most a technical and debatable violation of the Truth in Lending Act.<sup>59</sup>

Most of the cases that have followed *Ratner* cite the "horrendous, possibly annihilating punishment" statement as being a primary reason why the class action is not the superior method for the fair and efficient adjudication of the controversy. Two years after *Ratner* was decided, the Third Circuit noted that of fifty-one district courts considering motions for class actions in Truth in Lending cases, forty had denied such motions while only eleven had permitted a class action to proceed.<sup>60</sup> Most of the forty decisions cited and relied on *Ratner*.<sup>61</sup> Some of the eleven decisions cited *Ratner* but distinguished it or declined to follow it.<sup>62</sup>

## V. AMENDMENT OF THE TRUTH IN LENDING ACT

The decision in *Ratner* and the filing of class action suits involving potential damages of as much as eight billion dollars<sup>63</sup> gave considerable impetus to legislative activity to establish a maximum liability or otherwise restrict the scope of potential liability in class actions in Truth in Lending cases.<sup>64</sup> A provision to accomplish that

<sup>59</sup> *Id.*

<sup>60</sup> *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 763 n.9 (3d Cir. 1974).

<sup>61</sup> *E.g.*, *Berkman v. Sinclair Oil Corp.*, 59 F.R.D. 602 (N.D. Ill. 1973); *Lincig v. City Nat'l Bank*, 59 F.R.D. 154 (S.D. Ohio 1973); *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7 (D. D.C. 1973); *Alpert v. U.S. Industries, Inc.* (C.D. Cal. 1973); *Rogers v. Coburn Fin. Co.*, 54 F.R.D. 417 (N.D. Ga. 1972), *modifying* 53 F.R.D. 182 (N.D. Ga. 1971); *Shields v. First Nat'l Bank*, 56 F.R.D. 442 (D. Ariz. 1972); *Wilcox v. Commerce Bank*, 55 F.R.D. 134 (D. Kan. 1972), *aff'd* 474 F.2d 336 (10th Cir. 1973); *Kruger v. European Health Spa, Inc.*, 56 F.R.D. 104 (E.D. Wis. 1972); *Boggs v. Alto Trailer Sales, Inc.*, Civ. No. 72-1271 (E.D. La., Aug. 7, 1972), *vacated and remanded* 511 F.2d 114 (5th Cir. 1975); *Haynes v. Logan Furniture Mart, Inc.*, Civ. No. 70-C-1827 (N.D. Ill., Sept. 20, 1972), *rev'd* 503 F.2d 1161 (7th Cir. 1974); *Kenney v. Landis Financial Group, Inc.*, 349 F. Supp. 939 (N.D. Iowa 1972); *Rodriguez v. Family Publications Service, Inc.*, 57 F.R.D. 189 (C.D. Cal. 1972); *Alsop v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972).

<sup>62</sup> *Kristiansen v. John Mullins & Sons, Inc.*, 59 F.R.D. 99 (E.D. N.Y. 1973); *La Mar v. H & B Novelty & Loan Co.*, 55 F.R.D. 22 (D. Ore. 1972), *aff'd* 489 F.2d 461 (9th Cir. 1973); *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545 (N.D. Ill. 1972).

<sup>63</sup> *See, e.g.*, *Gerlach v. Allstate Ins. Co.* 338 F. Supp. 642 (S.D. Fla. 1972) (\$1 billion potential liability); *Alsop v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972) (\$8 billion potential liability in companion *Mullen* case); *Kroll v. Cities Service Oil Co.*, 352 F. Supp. 357 (N.D. Ill. 1972) (\$68 million alleged liability); *Wilcox v. Commerce Bank*, 55 F.R.D. 134 (D. Kan. 1972), *aff'd* 474 F.2d 336 (10th Cir. 1973) (\$18 million alleged liability); *Katz v. Carte Blanche Corp.*, 52 F.R.D. 510, 53 F.R.D. 539 (W.D. Pa. 1971), *rev'd on rehearing en banc*, 496 F.2d 747 (3d Cir. 1973) (\$60 million potential liability).

<sup>64</sup> *See, e.g.*, Board of Governors of the Federal Reserve System, ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1972, 13-14 (1973); 118 CONG. REC. 6913

result was added to a bill before the Senate in 1972.<sup>65</sup> It was approved by the Senate but died in the House of Representatives with the close of the Ninety-Second Congress. A bill proposing a similar amendment was introduced in the First Session of the Ninety-Third Congress.<sup>66</sup> Finally, such an amendment was passed on October 28, 1974.<sup>67</sup> The "horrendous, possibly annihilating punishment" aspect of *Ratner* was removed by the amendment of the Truth in Lending law,<sup>68</sup> and the question of the superiority of class action procedure in Truth in Lending cases must now be determined without regard to that factor.

The amendment of the Truth in Lending law changed the amount recoverable<sup>69</sup> to the sum of:

(1) any actual damage sustained as a result of the failure to comply with the Act;

(2) (A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph may not be less than \$100 nor greater than \$1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action may not be more than the lesser of \$100,000 or one per centum of the net worth of the creditor,<sup>70</sup> and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

The amendment further provides that in determining the amount of the award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor,

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(daily ed. Apr. 27, 1972) (letter from J. L. Robertson, Vice Chairman of the Federal Reserve Board, to Senator William Proxmire).

<sup>65</sup> S. 653, 92d Cong., 2d Sess., § 208 (1972).

<sup>66</sup> S. 914, 93d Cong., 1st Sess., § 208 (1972).

<sup>67</sup> 15 U.S.C. § 1640 (1974).

<sup>68</sup> *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114, 118 (5th Cir. 1975).

<sup>69</sup> 15 U.S.C. § 1640(a) (1974); see text at *supra* note 30.

<sup>70</sup> The House and Senate Conference Committee Report (No. 93-1429) states:

The limitation on class action suits was further limited to the lesser of \$100,000 or 1 percent of the net worth of the creditor to protect small business firms from catastrophic judgments.

1974 U.S. CODE CONG. & ADMIN. NEWS, 6153.

the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.<sup>71</sup>

## VI. THE SUPERIORITY REQUIREMENT

### A. Fundamental Considerations

When a court determines whether to certify a class action, its task is to inquire whether the requirements of rule 23 have been met, not whether the plaintiff will probably prevail on the merits.<sup>72</sup> The procedure followed in some cases of a preliminary hearing (or "mini" hearing) to inquire into the merits of a suit to ascertain which party is most likely to prevail<sup>73</sup> was repudiated by the Supreme Court in *Eisen IV*,<sup>74</sup> and presumably has been laid to rest.

The Third Circuit has suggested that in order to make a superiority finding the court must undertake (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison as to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication by each method.<sup>75</sup> The question of the manageability of the suit as a class action has been discussed in most reported cases in the massive class action area, and has been one of the difficult hurdles for the courts to overcome in resolving the superiority problem.<sup>76</sup> Professor Wright has written that if courts are encouraged "to allow maintenance of class actions in controversies that are unmanageable . . . the rule may come into disrepute even for the cases to which it is well suited."<sup>77</sup> That warning was timely

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<sup>71</sup> 15 U.S.C. § 1640(a) (1974) makes that section as amended partially retroactive:

(e) The amendments made by sections 406, 407, and 408 shall apply in determining the liability of any person under chapter 2 or 4 of the Truth in Lending Act, unless prior to the date of enactment of the Act such liability has been determined by final judgment of a court of competent jurisdiction and no further review of such judgment may be had by appeal or otherwise.

<sup>72</sup> *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1201 (6th Cir. 1974); *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971); *Hoston v. U.S. Gypsum Co.*, 67 F.R.D. 650, 653 (E.D. La. 1975).

<sup>73</sup> *E.g.*, *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565 (S.D. N.Y. 1972), *rev'd and case dismissed*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156 (1974); *Dolgow v. Anderson*, 53 F.R.D. 664 (E.D. N.Y. 1971), *aff'd* 464 F.2d 437 (2d Cir. 1972).

<sup>74</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

<sup>75</sup> *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 757 (3d Cir. 1974).

<sup>76</sup> *E.g.*, *Eisen v. Carlisle & Jacquelin (Eisen III)*, 479 F.2d 1005 (2d Cir. 1973); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973).

<sup>77</sup> C. WRIGHT, LAW OF FEDERAL COURTS § 72 at 307 (1970).

but has been ignored. Another commentator has suggested that rule 23 has been utilized "to bring into the federal courts literally millions of claims which otherwise would never have been litigated."<sup>78</sup>

### B. *Elements of the Management Question*

Among the separate but interrelated variables involved in a court's analysis of problems to be encountered in managing a Truth in Lending class action may be:

(1) The size of the class, which may vary from a few persons who dealt with a small institution to millions of defrauded customers of a countrywide chain;

(2) Class members who may be identifiable with ease, or only after the expenditure of considerable time, effort and money;

(3) Actual damages suffered by individual class members of a few cents to hundreds of dollars; or no actual damages, limiting the recovery to the statutory civil penalties;<sup>79</sup>

(4) The presence of counterclaims against individual members of the class, which may result in excluding them from the action, or separate trials;<sup>80</sup>

(5) Miniscule benefits to individual class members, even from a very large dollar recovery in which the only benefits of consequence would inure to the attorneys by reason of fees awarded to them.<sup>81</sup> Because a satisfactory answer to the management question may be determinative of the superiority requirement, all such questions have a direct bearing on the matter of superiority.

### C. *Incentives for Litigants and Lawyers*

A court undertaking to consider the superiority question will be aware that the Truth in Lending Act "reflects a transition in congressional policy from a philosophy of let the buyer beware to one of let the seller disclose."<sup>82</sup> It may inquire whether creditors who disregard their responsibilities under the Act and cause damage to members of a class should be entitled to have any assurance that their accumu-

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<sup>78</sup> Pollack, *Class Actions Reconsidered: Theory and Practice Under Amended Rule 23*, 28 BUS. LAW. 741, 742 (1973).

<sup>79</sup> Travers and Landers, *The Consumer Class Action*, 18 KAN. L. REV. 811, 826 (1970).

<sup>80</sup> See *Albert v. United States Industries, Inc.*, 59 F.R.D. 491, 499 (C.D. Cal. 1973).

<sup>81</sup> E.g., *Eisen v. Carlisle & Jacquelin (Eisen II)*, 391 F.2d 555, 571 (Lumbard, C.J., dissenting) (2d Cir. 1968).

<sup>82</sup> *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 377 (1973).

lated responsibility cannot be enforced in a class action.<sup>83</sup> It may take into account whether the "purpose of enacting the statutory minimum damage provision was as much to induce creditor compliance with the Act as to provide incentives for private litigants."<sup>84</sup>

Part of the scheme of the statute is to create a private attorney general to participate prominently in enforcement. Congress invited people, whether they were themselves deceived or not, to sue in the public interest.<sup>85</sup> The emphasis on private enforcement is thus intended to encourage civil actions to insure compliance.<sup>86</sup> In *Ratner*, Judge Frankel found that the incentive of class-action benefits was unnecessary in view of the Act's provision for a \$100 minimum recovery and payment of costs and a reasonable fee for counsel.<sup>87</sup> The District Court for the District of Columbia stated that "the incentive offered by a class action is not necessary to enforce the provisions of the Act because each individual member of the proposed class has an adequate remedy by means other than a class action."<sup>88</sup> To the contrary, the Seventh Circuit declared that "the argument that the incentive for individual litigation precludes class action litigation assumes that the incentive solely relates to consumer motivation to sue rather than to creditor compliance with the Act."<sup>89</sup>

The incentive question was before a district court in Alabama in an action brought under the National Bank Act<sup>90</sup> contending that the defendant bank had charged a rate of interest on credit extended through the BankAmericard system that was in excess of the rate allowed by state law, and that this was in violation of the Bank Act.<sup>91</sup> On motions pro and con class action status, *Ratner* and its progeny were cited to the court. The court declined to follow the Truth in Lending cases, because in the action before it the National Bank Act made no provision for a minimum recovery nor for an award of costs and attorney's fees. The court declared:

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<sup>83</sup> See *Wilcox v. Commerce Bank*, 474 F.2d 336, 348 (10th Cir. 1973).

<sup>84</sup> *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164 (7th Cir. 1974).

<sup>85</sup> *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 280 (S.D. N.Y. 1971).

It may be questioned whether a plaintiff who was not himself deceived, and who suffered no personal loss, would meet the requirement of Rule 23(a)(3) that his "claims . . . are typical of the claims . . . of the class"?

<sup>86</sup> *Ives v. W. T. Grant Co.*, 522 F.2d 749, 756 (2d Cir. 1975).

<sup>87</sup> *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 (S.D. N.Y. 1972).

<sup>88</sup> *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7, 16 (D. D.C. 1973).

<sup>89</sup> *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164 (7th Cir. 1974).

<sup>90</sup> 12 U.S.C. § 85 (1976).

<sup>91</sup> *Partain v. First Nat'l Bank*, 59 F.R.D. 56 (M.D. Ala. 1973).

In the absence of such a statutory incentive, the class suit provides small claimants like plaintiffs in this case the only practicable method of obtaining judicial consideration of their grievances. The potential recovery [about \$50 per class member] is too small to justify individual litigation. Thus, if a class action is denied in this case, one of the principal functions of Rule 23—to provide a means of vindicating wrongs which, although involving small amounts individually, affect a large number of people—will be thwarted.<sup>92</sup>

That analysis appears to support a denial of class action status in Truth in Lending cases, because the Act now provides for the recovery of actual damages plus statutory civil penalties, costs, and attorney's fees in actions maintained by individuals.<sup>93</sup>

The Alabama court was reluctant to deny class action status and, in expressing its philosophy, stated:

Only in rare instances such as where the expense of maintaining the action would exceed any recovery which might accrue to the class members, or where other factors would make a class suit completely unmanageable, is a court justified in denying class treatment when to do so effectively denies access to the courts.<sup>94</sup>

#### D. *Taking Care of the Smaller Guy*

The class action concept based on "taking care of the smaller guy"<sup>95</sup> has received criticism as well as praise. Professor Milton Handler points out that "the benefit that accrues to an individual class member is frequently negligible where his claim is small and the class is very large."<sup>96</sup> Several courts have referred to such actions as devices for the solicitation of litigation,<sup>97</sup> or as encouraging "unnecessary litigation mainly for the benefit of a few lawyers ready and willing to promote such cases."<sup>98</sup> A district court in Kansas considered it "at least debatable whether the small claimant has received much benefit from amended Rule 23."<sup>99</sup> In a frequently quoted article viewing the

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<sup>92</sup> *Id.* at 61.

<sup>93</sup> See text *supra* at note 69.

<sup>94</sup> *Partain v. First Nat'l Bank*, 59 F.R.D. 56, 61 (M.D. Ala. 1973).

<sup>95</sup> See text *supra* at note 7. See also *King v. Kansas City Southern Industries, Inc.*, 519 F.2d 20, 25-26 (7th Cir. 1975).

<sup>96</sup> Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9-10 (1971).

<sup>97</sup> *Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1251 (N.D. Ga. 1971).

<sup>98</sup> *Shields v. Valley Nat'l Bank*, 46 F.R.D. 448, 451 (D. Ariz. 1971).

<sup>99</sup> *Wilcox v. Commerce Bank*, 55 F.R.D. 134, 137 (D. Kan. 1972), *aff'd* 474 F.2d 336 (10th Cir. 1974).

massive class action from the plaintiff's viewpoint, the term "sheer nonsense" is the characterization given to the concept of class actions as tools to obtain redress for persons whose individual losses are too small to justify litigation in separate actions.<sup>100</sup> The commentator in that article insists that the "sole reason for permitting class actions should be to deter law violations by depriving the wrongdoer of the profits where there is no better way to do so."<sup>101</sup> A law review note declares that "most large classes with small individual claims are particularly apt to be unmanageable if the chief purpose is viewed as individual compensation."<sup>102</sup>

Whatever may have been the intention of the rulemakers, it is apparent that the desirability of providing small claimants a forum for the recovery of small awards derived from large-scale violations does not eclipse the problem of manageability. Even when that problem is solved, it seems likely, as Judge Lumbard stated in *Eisen II*, that "the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who represent them."<sup>103</sup>

#### E. *Private Enforcement of the Law*

Private enforcement provides a necessary supplement to governmental action "both by affording relief to those injured and by serving as a deterrent to the wrongdoer."<sup>104</sup> In this area, the Supreme Court has directed the lower courts to "be alert to provide such remedies as are necessary to make effective the congressional purpose."<sup>105</sup> The utility of a class action to afford relief to those who "are in a poor position to seek legal redress, either because they do not know enough or because each redress is disproportionately expensive,"<sup>106</sup> is only one aspect of private enforcement. Of equal or greater significance is the *in terrorem* effect of the class action as a deterrent to wrongdoing. In *Dolgow v. Anderson*,<sup>107</sup> Judge Weinstein stated "the record of litigated cases is prophylactic—a deterrent to

<sup>100</sup> Belcher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365 (1972).

<sup>101</sup> *Id.* at 368-69.

<sup>102</sup> Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1167 (1974).

<sup>103</sup> *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 571 (2d Cir. 1968).

<sup>104</sup> *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

<sup>105</sup> *Id.*

<sup>106</sup> Kalven and Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

<sup>107</sup> *Dolgow v. Anderson*, 43 F.R.D. 472, 487 (E.D. N.Y. 1968).

future wrongdoing. Every successful suit duly rewarded encourages other suits to redress misconduct and by the same token discourages misconduct which would occasion suit."<sup>108</sup>

In *Ratner*, the plaintiff insisted that class actions were "essential if private enforcement [were] to render violations of the law unprofitable."<sup>109</sup> Ratner's counsel argued that

the creditor's standardized conduct affects large numbers of consumers, and by withholding required information a creditor may stand to gain many thousands of dollars in additional finance charges.<sup>110</sup> In comparison to this large potential gain from illegality, the \$100 damages and individual action legal fee is evidently trivial and inadequate to deter a creditor from deliberately flouting the law or adopting practices of dubious legality.<sup>111</sup>

While Judge Frankel did not accept that argument as meeting the rule's requirement of superiority, other courts have found merit in it.<sup>112</sup> Moreover, there may be some support for such contentions in Mr. Chief Justice Burger's comments in *Mourning v. Family Publications Service, Inc.*:<sup>113</sup>

Congress was clearly aware that merchants could evade the reporting requirements of the Act by concealing credit charges. In delegating rulemaking authority to the [Federal Reserve] Board, Congress emphasized the Board's authority to prevent such evasion.<sup>114</sup>

The Chief Justice further noted that the deterrent effect of the Board rule under challenge in that case clearly implemented the "objectives of the Act."<sup>115</sup>

Such statements make it proper to recognize that the deterrent effect resulting from private enforcement of the Truth in Lending Act is a material element of that legislation. Nonetheless, if the deterrent effect is produced primarily because a class action "utilizes the threat of unmanageable and expensive litigation to compel settlement,"<sup>116</sup>

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<sup>108</sup> See Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 663 (1956).

<sup>109</sup> Plaintiff's Memorandum in Support of Class Action 18, Case No. 69-Civ.4195 (S.D. N.Y. Dec. 6, 1971).

<sup>110</sup> This argument seems specious; the Act does not prohibit excessive charges, it merely requires their disclosure. Most creditors will ignore the disclosure.

<sup>111</sup> Plaintiff's Memorandum in Support of Class Action, *supra* note 109.

<sup>112</sup> E.g., *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164-1165 (7th Cir. 1974).

<sup>113</sup> 411 U.S. 356 (1973).

<sup>114</sup> *Id.* at 371.

<sup>115</sup> *Id.* at 373.

<sup>116</sup> Handler, *The Shift From Substantive to Procedural Innovations in Antitrust*



the class action is certainly not "superior to other available methods for the fair and efficient adjudication of the controversy."<sup>117</sup> In any event, the deterrent effect argument provides no satisfactory answer to the proposition that little benefit results to the individual members of the class. When deterrence is the objective, it seems reasonable to believe that it "could be achieved by fairer, more discriminating and administratively less onerous means."<sup>118</sup>

## VII. ANALYSIS OF SUPERIORITY ELEMENTS

### A. *Class Action Damages: the Fluid Class Recovery*

Until the 1974 amendment of the Truth in Lending Act there was no mention of class actions in that law. Now, §1640(a)(2)(B) provides for a lump sum award to a class of an amount not exceeding the lesser of \$100,000 or one per centum of the net worth of the creditor, plus costs and a reasonable attorney's fee as determined by the court.

This damage section appears to deal with part of the problem involved in the fluid class recovery, which was first utilized in the *Antibiotic* cases.<sup>119</sup> The enactment affords a method of creating the fund to be awarded to the class, if a class action is successfully maintained, based on the concept that the errant defendant should not be permitted to retain a "pot of gold" created by his illegal activities. The statute does not, however, provide any method of distributing that fund to the members of the class for whose alleged benefit the action was maintained. As a consequence, the difficulty of distributing the fund to its rightful recipients may cause the class to be unmanageable.<sup>120</sup> When Judge Lord sustained the manageability of the proposed consumer class in the *Antibiotic* cases, he held that individual claims could be made "against the judgment awarded to the class."<sup>121</sup> He reserved for further consideration a determination of what should be done with the balance of the recovery after paying

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*Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971), terming such a device "a form of legalized blackmail."

<sup>117</sup> FED. R. CIV. P. 23(b)(3).

<sup>118</sup> Handler, *supra* note 116, at 9.

<sup>119</sup> *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 287 (S.D. N.Y. 1971).

<sup>120</sup> See *Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 72 (D. N.J. 1971) stating: It is readily apparent that no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable.

<sup>121</sup> *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281 (S.D. N.Y. 1971).

the individual claims that were presented.

In other cases, courts have ordered distribution of the residual fund in ways calculated to "assure that the benefits of any recovery would flow in the main to those who bore the burden of the defendants' allegedly illegal acts."<sup>122</sup> Such a procedure has been characterized as creating an unwarranted double standard whereby "in litigation other than class actions, prescribed substantive requirements and basic procedures continue to govern; but in class actions, primarily in order to make them 'manageable,' at least some courts have sanctioned a contraction of both defendants' rights and plaintiffs' obligations."<sup>123</sup>

When the Second Circuit decided *Eisen III*,<sup>124</sup> it repudiated the principle of fluid class recovery, terming it an unconstitutional violation of due process because it subjected the defendant to gross damages involving large numbers of unidentifiable and unasserted claims. The court declared this procedure "illegal, inadmissible as a solution of the unmanageability problems of class actions and wholly improper."<sup>125</sup>

The Supreme Court had a chance to write the final chapter of the fluid class recovery epic, but declined to do so. Mr. Justice Powell pointed out in a footnote that, because the court found the notice requirements of rule 23 to be dispositive,

[w]e therefore have no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid-class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction.<sup>126</sup>

If the Supreme Court had affirmed the Second Circuit's repudiation of fluid class recovery, would Congress have enacted the new damages provisions, § 1640(a)(2)(B)? Since Congress did enact that section, will the courts treat the legislation as tacit congressional approval of the fluid class recovery principle? Whatever may be the answers to such questions, the fluid class recovery appears to permit "private attorneys general," created by the amended Truth in Lend-

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<sup>122</sup> *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 264 (S.D. N.Y. 1971). See also *West Virginia v. Charles Pfizer and Co., Inc.*, 314 F. Supp. 710 (S.D. N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971); *Bebchick v. Public Utilities Commission*, 318 F.2d 187 (D.C. Cir. 1963).

<sup>123</sup> Pollock, *Class Actions Reconsidered: Theory and Practice Under Amended Rule 23*, 28 Bus. Law. 741, 746 (1973).

<sup>124</sup> 479 F.2d 1005 (2d Cir. 1973).

<sup>125</sup> *Id.* at 1018.

<sup>126</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 n.10 (1974).

ing law, to redress wrongs allegedly done to an unidentifiable, broadly-defined segment of the community rather than to seek benefits for identifiable clients.<sup>127</sup>

The amended Truth in Lending Act substitutes the "class as a whole"<sup>128</sup> for the individual members of the class as claimants. The court is authorized to make an allowance to the class, limited to a sum not more than "the lesser of \$100,000 or 1 per centum of the net worth of the creditor."<sup>129</sup> Amazing as it may seem, the size of the class is not stated as one of the relevant factors to be considered by the court in determining the amount of the award.<sup>130</sup> The Act mentions "persons adversely affected," but does not define that term and they may or may not be members of any class.

It has been contended that if the courts are to carry out the intent of the drafters of rule 23(b)(3), the *cy pres* doctrine must be applied to large class actions which result in the accumulation of a fund which is not claimed by the putative members of the class.<sup>131</sup> The amendment of the Truth in Lending Act makes that contention even more significant than before. Thus the prospect that a substantial portion of the class will not share in the recovery causes the superiority of the class action to be doubtful.

There is some justification for a view that the award to the class as a whole was not intended to benefit the individual class members. The relevant factors to be considered by the court appear to be directed toward punishment of the creditor, rather than as compensation to injured borrowers. The statute lists as such relevant factors (1) the amount of any actual damages awarded [to individuals], (2) the frequency and persistence of failures of compliance by the creditor, (3) the resources of the creditor, (4) the number of persons "adversely affected" [but such persons are not necessarily identifiable as members of any class], and (5) the extent to which the creditor's failure of compliance was intentional.<sup>132</sup> Unless individual class members suffer actual damages which they can prove in the class action litigation,<sup>133</sup> the only benefit they may derive from such proceedings will

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<sup>127</sup> Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 386 (1972).

<sup>128</sup> See *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1974).

<sup>129</sup> 15 U.S.C. § 1640(a)(2)(B) (1974).

<sup>130</sup> 15 U.S.C. § 1640(a)(3) (1974).

<sup>131</sup> Note, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972).

<sup>132</sup> 15 U.S.C. § 1640(a)(3) (1974).

<sup>133</sup> Cf., *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443, 455 (M.D. Ga. 1975), stating:

be some portion of the award to the class as a whole, paid upon some basis of fluid class distribution.

The Fifth Circuit was confronted with this situation in April, 1975 when it considered an action against a trailer sales company charging violation of the Truth in Lending Act in failing to disclose specified financing information prior to the consummation of some one hundred and twenty-one credit transactions.<sup>134</sup> Class action status had been denied by the district court, based upon the lack of superiority of the class action as a method of proceeding under the facts. That trial court relied on (1) no lack of incentive if class action procedure were not employed since each claimant was provided with reasonable attorney's fees and costs under the Act; and (2) the possible horrendous consequences to the trailer sales company caused by a damage award of at least \$100 to each class member under the old provisions of the Act.<sup>135</sup>

The trial court had rendered judgment for the individual plaintiffs for \$848 (twice the finance charge) plus attorney's fees of \$4,000 and costs. The trial court also had granted injunctive relief for the benefit of all future credit purchasers. The defendant paid the judgment, but the plaintiffs appealed from the denial of class action status.<sup>136</sup>

In remanding the case for reconsideration of the class action motion, the Fifth Circuit held that the 1974 amendment of the Truth in Lending Act had removed the "horrendous result" basis of the district court's ruling. It directed the district court to reconsider the motion "in light of facts developed, or to be developed, relating to . . . (4) the superiority of the class action procedure absent the specter of a horrendous result being inflicted upon [the defendant] and in light of the reduction in damages, if any, to the individual members of the class."<sup>137</sup> Without intimating any "view as to what the district court's decision should be on the merits of this class action motion,"<sup>138</sup> Judge Bell observed that, in light of the amendment, the

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A recognition that each member of the class would have a right to come into court and give evidence raises staggering problems of logistics. Manageability could not be assured, or even predicted. [Citing *Ralston v. Volkswagenwerk, A. G.*, 61 F.R.D. 427, 432-33 (W.D. Mo. 1973)].

<sup>134</sup> *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114 (5th Cir. 1975).

<sup>135</sup> *Id.* at 117-18.

<sup>136</sup> *Boggs v. Alto Trailer Sales, Inc.*, Civil Action No. 71-1271, Memorandum in Opposition to Plaintiffs' Motion to Amend the Complaint, 2 (E.D. La. Dec. 20, 1975).

<sup>137</sup> *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114, 118 (1975).

<sup>138</sup> *Id.* at 118.

recovery by a class member might be "in a lesser amount than would be the case in an individual action."<sup>139</sup> He illustrated his observation by assuming a hypothetical net worth of the trailer sales company,<sup>140</sup> which he then divided by the number of class members to arrive at a pro rata distribution of the fund. Judge Bell then asserted:

In a successful class action without proof of actual damages, each class member would receive less than \$42, dividing one percent of the assumed net worth among class members. Suing individually, on the other hand, each class member could recover double the amount of the finance charge up to \$1,000, and, in any event, a minimum of \$100.<sup>141</sup>

Instead of taking steps for a reconsideration of the motion to proceed as a class, the plaintiffs asked leave of the district court to amend their complaint to assert a claim for actual damages. The district court denied the motion to amend, holding that the issue of the named plaintiffs' damages had been finally determined without appeal.<sup>142</sup> Thus at this writing, this case sheds no further light upon the problem under consideration.

#### B. *Actual Damages: A New Remedy*

The amendment of the Truth in Lending Act provides that any creditor who fails to comply with the requirements of the Act with respect to any person is liable to such person for "any actual damage sustained by such person as a result of the failure."<sup>143</sup> Thus, if the borrower is able to prove that he did sustain actual damages, he may recover such damages in addition to the statutory civil penalties, costs of the action, and a reasonable attorney's fee as determined by the court.

Prior to this amendment of the law, the Truth in Lending Act made no provision for the recovery of actual damages. While there might have been a recovery of "twice the amount of the finance charge in connection with the transaction,"<sup>144</sup> it was not necessary

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<sup>139</sup> *Id.* at 119.

<sup>140</sup> *Id.* at 118.

<sup>141</sup> The report uses a figure of \$500,000, but the arithmetic suggests \$5,000.00 was the intended assumption. See 511 F.2d at 118.

<sup>142</sup> *Id.*

<sup>143</sup> 15 U.S.C. § 1640(a)(1) (1974).

<sup>144</sup> Act of May 29, 1968, Pub. L. No. 90-321, Title I, 82 Stat. 157, formerly 15 U.S.C. § 1640(a)(1).

that the finance charge should have been paid or incurred.<sup>145</sup> The civil penalty was assessed under the former law (and is assessed under the present law) for failure of the creditor *to disclose* the necessary information, not for imposing or collecting the finance charge.<sup>146</sup>

The courts have generally recognized that actual damages in the Truth in Lending situation are often speculative and particularly difficult to prove.<sup>147</sup> Nonetheless, in one case under the former law, the Seventh Circuit believed that actual damages approximated a finance charge and an interest rate.<sup>148</sup> A commentator has suggested that if proof of all individual damages was not feasible, actual damages could be set by a determination of the gross amount of damages caused by a creditor to a class, utilizing the creditor's business records and available statistics.<sup>149</sup> That suggestion resembles some proposals made in some of the fluid recovery type cases,<sup>150</sup> but is not acceptable under the amended Truth in Lending Act, which spells out the manner in which a court must arrive at the amount of an award to the class as a whole.<sup>151</sup> Actual damages constitute an additional basis of recovery.

Under the former law, it was held that each individual member of the proposed class had "an adequate remedy by means other than a class action,"<sup>152</sup> and that the awards provided were "specifically designed by Congress to encourage each consumer to serve as a private attorney general in enforcing the Act."<sup>153</sup> The addition of a right to recover actual damages constitutes another incentive as well as a new remedy.

### C. *Statutory Damages: the Civil Penalties*

The statutory provision for the recovery of civil penalties of

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<sup>145</sup> *E.g.*, *Wilcox v. Commerce Bank*, 474 F.2d 336, 347 (10th Cir. 1973); *Shields v. First Nat'l Bank*, 56 F.R.D. 442, 446 (D. Ariz. 1972); *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 279 (S.D. N.Y. 1971). *Cf.* *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545, 548 (N.D. Ill. 1972).

<sup>146</sup> *E.g.*, *Hoffman v. Charnita, Inc.*, 58 F.R.D. 86, 95 (M.D. Pa. 1973).

<sup>147</sup> *Beard v. King Appliance Co.*, 61 F.R.D. 434, 438 (E.D. Va. 1973).

<sup>148</sup> *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974). *Cf.* *Alpert v. U.S. Industries, Inc.*, 59 F.R.D. 491, 497 (C.D. Cal. 1973); *Rodriguez v. Family Publications Service, Inc.*, 57 F.R.D. 189, 194 (C.D. Cal. 1972).

<sup>149</sup> Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1170 (1974). See also *Partain v. First Nat'l Bank*, 59 F.R.D. 56, 59 (M.D. Ala. 1973).

<sup>150</sup> See text *supra* at notes 103-108.

<sup>151</sup> See text *supra* at note 115.

<sup>152</sup> *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7, 16 (D.D.C. 1973).

<sup>153</sup> *Alsop v. Montgomery Ward & Co.*, 57 F.R.D. 89, 93 (N.D. Cal. 1972).

twice the amount of any finance charge, but not less than \$100 nor more than \$1,000, is limited to individual actions by the 1974 amendment of the Truth in Lending Act.<sup>154</sup> This limitation adds further incentive for a consumer to proceed as an individual, especially if he can prove actual damages in addition to recovering the civil penalties. Moreover, if the class of which such a person would be a member is of any considerable size, his money recovery as an individual plaintiff will likely be greater than what he might receive under the new and limited class action provision of the amended Truth in Lending Act.<sup>155</sup>

An example of the manner in which awards to individual plaintiffs may be made under the amended Truth in Lending statute is found in *Mason v. General Finance Corp.*,<sup>156</sup> in which a husband and wife sought to recover statutory civil penalties and their attorney's fees. The court awarded to each plaintiff twice the finance charge on each of two transactions,<sup>157</sup> even though the two plaintiffs were co-signers of two installment notes. In addition, the court found that each plaintiff was "entitled to recover costs and attorney's fees."<sup>158</sup> The court also rendered judgment for the defendant on its counterclaim for the unpaid balance due it from the two plaintiffs.<sup>159</sup> In an action by a borrower against a mortgage broker involving two separate loans arranged by the defendant, the court found violations of the Truth in Lending Act by the defendant. Explaining its award, the court stated:

In the two transactions plaintiff received a total of \$2,764.92 and has repaid a total of \$1,515.19 leaving a balance of \$1,249.73, against which plaintiff is entitled to off-set her statutory damages of \$2,000.00—\$1,000.00 (the maximum) in each transaction—leaving a net balance of \$750.27 owing to plaintiff.<sup>160</sup>

The court found that plaintiff's counsel had devoted more than seventy-eight hours to the maintenance of the action and had ad-

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<sup>154</sup> 15 U.S.C. § 1640(a)(2)(A) (1974).

<sup>155</sup> In case of a miniscule finance charge, as has been common, if the class exceeded 1000 members, the individual recovery would be larger than a pro rata share of the class recovery.

<sup>156</sup> 401 F. Supp. 782 (E.D. Va. 1975).

<sup>157</sup> July transaction finance charge \$266.84; December transaction finance charge \$339.21; total award to each plaintiff \$1212.10.

<sup>158</sup> 401 F. Supp. at 792. See also *Walker v. College Toyota, Inc.*, 399 F. Supp. 778 (W.D. Va. 1974), *aff'd* 519 F.2d 447 (4th Cir. 1975).

<sup>159</sup> 401 F. Supp. at 792. Cf. *Powers v. Sims and Levin Realtors*, 396 F. Supp. 12 (E.D. Va. 1975); *Woods v. Beneficial Fin. Co.*, 395 F. Supp. 9 (D. Ore. 1975).

<sup>160</sup> *Pedro v. Pacific Plan of California*, 393 F. Supp. 315, 324 (N.D. Cal. 1975).

vanced \$432.48 in litigation expenses on her behalf. An award of \$3,000 was deemed reasonable compensation for such services and expenses.<sup>161</sup> This amount of attorney's fees clearly bore a reasonable relationship to the work performed and was such an award as Congress expected would encourage private enforcement of the Act.

In Pennsylvania an automobile buyer sued for violations of the Truth in Lending Act in connection with a credit sale. The court certified the plaintiff as the representative of a class "of all those who have been, or will be, denied their rights under 15 U.S.C. §1638 . . . by defendant."<sup>162</sup> Because the certification was under rule 23(b)(2), the court held that it was not required to make a superiority determination.<sup>163</sup> It further declared that its certification entitled plaintiff "to seek an injunction which [would] . . . apply to cover the entire class, but not enable her to press any monetary claims except her own."<sup>164</sup> The court awarded \$100 to the plaintiff under 15 U.S.C. § 1640(a)(1) (the original statute prior to the amendment) and stated that a further hearing would be scheduled to determine a reasonable attorney's fee.<sup>165</sup> Summary judgment was rendered for the plaintiff. Subsequently, upon a motion for reconsideration, the court reiterated its certification of the plaintiff as representative of the class, granted plaintiff's motion for a summary judgment, awarded plaintiff \$1,000, and enjoined the defendant from arranging for the extension of credit to plaintiff or to any member of the class she represented, without providing the disclosure required by 15 U.S.C. §1638.<sup>166</sup>

Truth in Lending decisions are now being reported with some frequency, and cases such as those mentioned above tend to show that superiority lies more in the area of the individual suit, sometimes aided by rule 23(b)(2) injunctive relief, than in the rule 23(b)(3) class action.

#### D. *Injunctive Relief: Another Available Method*

Notwithstanding the apparent consensus among the courts that

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<sup>161</sup> *Id.*

<sup>162</sup> *Manning v. Princeton Consumer Discount Co., Inc.*, 390 F. Supp. 320, 397 F. Supp. 504 (W.D. Pa. 1975).

<sup>163</sup> 390 F. Supp. at 324.

<sup>164</sup> *Id.* at 324-25.

<sup>165</sup> *Id.* at 326.

<sup>166</sup> 397 F. Supp. at 508-09. Although this judgment was rendered seven months after the amendment of 15 U.S.C. § 1640, the court apparently ignored that amendment, but there is no disclosure of how the award of \$1,000 was determined.



subdivision (b)(3) is the only part of rule 23 appropriate to the maintenance of class actions in Truth in Lending cases when a recovery of money is sought,<sup>167</sup> the Second Circuit has affirmed a class action injunction under subdivision (b)(2) of the rule.<sup>168</sup> This action was an attack on a coupon credit plan which was found to be illegal under Connecticut usury laws.<sup>169</sup> As part of its judgment, the district court ordered:

That the defendant be and is hereby permanently enjoined from collecting any further payments under outstanding coupon contracts in Connecticut, and from entering hereafter into any coupon contracts in Connecticut on which the annual percentage rate exceeds twelve percent.<sup>170</sup>

The defendant contended that ordering a defendant not to collect money from members of a class was the same as ordering a defendant to pay money damages; hence, notice should have been required under rule 23(c)(2). The court disagreed. It held that the injunction merely required the defendant "to stop violating the law," which was "a far cry from an award of class-wide damages."<sup>171</sup>

This decision makes the point that a court may deny class action status under subdivision (b)(3) if it finds that a class action thereunder is not superior to relief under some other subdivision of rule 23 for the fair and efficient adjudication of the controversy. This approach was suggested by way of an amendment to rule 23 in the 1972 Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure of the American College of Trial Lawyers.<sup>172</sup> That report recommended that in (b)(3) actions "where the damages likely to be recovered by individual class members are minimal and yet some important social function may be served if a class action is allowed, the court should be required to consider the alternatives available under subdivision (b)(2)."<sup>173</sup>

Application of subdivision (b)(2) of rule 23 is limited to actions

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<sup>167</sup> See text *supra* at note 38. See also *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466-67 (9th Cir. 1973).

<sup>168</sup> *Ives v. W. T. Grant Co.*, 522 F.2d 749, 764-65 (2d Cir. 1975).

<sup>169</sup> *Id.* at 762.

<sup>170</sup> *Id.* at 764.

<sup>171</sup> *Id.* at 764-65. The Second Circuit's decision was rendered subsequent to the date the amendments of 15 U.S.C. § 1640 became effective. See 522 F.2d at 753-54 n.6.

<sup>172</sup> See at 2, 29. See also *La Mar v. H & B Novelty & Loan Company*, 489 F.2d 461, 468 n.19 (1973); *Wilcox v. Commerce Bank*, 474 F.2d 336, 342 n.18 (10th Cir. 1973).

<sup>173</sup> Report and Recommendations, see *supra*, note 172, at 29.

in which an injunction or declaratory judgment is appropriate to prevent the party opposing the class from continuing activities that violate the rights of the class as a whole. The Advisory Committee's Note states that "[a]ction or inaction is directed to a class within the meaning of [subdivision (b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class."<sup>174</sup> The pertinent question is whether the defendant's conduct would affect all persons similarly situated. If so, his acts apply to the class as a whole. There are no "opt-out" provisions available in (b)(2) cases, class members have no right to exclude themselves from the class,<sup>175</sup> and (b)(2) suits cannot be maintained if the relief sought relates predominately to the recovery of money damages.<sup>176</sup>

Whether pretrial notice should be given to class members in a (b)(2) class action is not settled. Certainly the mandatory provision of subdivision (c)(2) is not applicable. It has been suggested that a court would be well advised to require notice if (1) property rights are to be adjudicated, (2) the adequacy of the representation of the class is questioned. It has also been asserted that the right to know concept would warrant notice to help maintain the integrity of the class action device.<sup>177</sup> In any event, there is no authoritative decision requiring the (c)(2) type of notice to be given in a (b)(2) class action and, as a consequence, the (b)(2) suit in class actions under the Truth in Lending Act (when appropriate) appears to be superior to the (b)(3) action.

Amended § 1640(a)(2)(B) of the Truth in Lending Act now expressly provides that in a class action no minimum recovery is to be required. That provision and the limitation on the amount of any monetary award to the class as a whole<sup>178</sup> lend support to the view that the court should consider injunctive relief before granting class action certification under subdivision (b)(3). In this connection, the rule is well established that if an action can be maintained under

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<sup>174</sup> *Advisory Comm. Note*, 39 F.R.D. at 102.

<sup>175</sup> *Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Air Lines, Inc.*, 490 F.2d 636 (7th Cir. 1973).

<sup>176</sup> *Advisory Comm. Note*, 39 F.R.D. at 102 (1966). The issue here is whether the injunction is incidental to the money damages, or the money damages are incidental to the injunction. See, e.g., *Sabala v. Western Gillette, Inc.*, 371 F. Supp. 385, 391 (D.C. Tex. 1974).

<sup>177</sup> Note, *Class Actions Under Rule 23(b)(2): A Type of Class Action Which Does Not Require Eisen Notice*, 24 CLEV. ST. L. REV. 504, 521-22 (1975).

<sup>178</sup> See text *supra* at note 70. Cf. *Ungar v. Dunkin' Donuts, Inc.*, 68 F.R.D. 65, 135 (E.D. Pa. 1975).

subdivisions (b)(1) or (b)(2), and also under (b)(3), the court should order that it proceed under (b)(1) or (b)(2), rather than under (b)(3), so that the judgment will have *res judicata* effect as to all class members.<sup>179</sup>

#### E. *The Test Case: Another Available Method*

The Third Circuit decision in *Katz v. Carte Blanche Corp.*<sup>180</sup> poses a question whether a "test case," as so described by that court, would be a superior alternative to the rule 23(b)(3) class action. Katz sued on behalf of the credit card holders of Carte Blanche Corporation alleging failure to make the required disclosures under the Truth in Lending Act. He sought to recover for each class member the \$100 minimum civil penalty provided by former § 1640(a)(1). The district court certified a rule 23(b)(3) class.<sup>181</sup> A Third Circuit panel affirmed the class action certification,<sup>182</sup> but this decision was vacated and the issue was reheard *en banc*. In reversing the district court,<sup>183</sup> the Third Circuit *en banc* remanded the case to the district court to go forward with a trial on the liability phase of the case as an individual test case on behalf of Katz alone.<sup>184</sup>

With scant consideration of the requirement of subdivision (c)(1) of rule 23,<sup>185</sup> the appellate court held that the factors of predominance and superiority need not be determined at the outset of the lawsuit, if the defendant had sought a postponement of that determination on the ground of fairness.<sup>186</sup> The court envisioned the test case as resulting in a final judgment<sup>187</sup> as between the named plaintiff and the defendant and creating a *stare decisis* effect as between the defendants and members of the putative class<sup>188</sup> which could be enforced by offensive collateral estoppel. The court left for future considera-

<sup>179</sup> *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532, 534 (S.D. N.Y. 1971); *Van GERMERT v. Boeing Co.*, 259 F.Supp. 125, 130 (S.D. N.Y. 1966); 3B MOORE'S FEDERAL PRACTICE § 23.31[3], at 23-526, 23-527 (2d ed. 1975).

<sup>180</sup> 496 F.2d 747 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974).

<sup>181</sup> *Katz v. Carte Blanche Corp.*, 53 F.R.D. 539 (W.D. Pa. 1971), *supplementing* 52 F.R.D. 510 (W.D. Pa. 1971).

<sup>182</sup> 17 FED. RULES SERV. 2d 279 (3d Cir. 1973).

<sup>183</sup> *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 764 (3d Cir. 1974) (*en banc*).

<sup>184</sup> *Id.* at 760, 761.

<sup>185</sup> "(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. . . ."

<sup>186</sup> 496 F.2d at 758.

<sup>187</sup> *Id.* at 758.

<sup>188</sup> *Id.* at 759, 766-67.

tion, if found appropriate by the district court, any possible consideration of allowing any other phases of the case to proceed as a class action, should *Katz* prevail.<sup>189</sup> If *Carte Blanche* prevailed, the case would end.<sup>190</sup> Of course, the consent of the defendant to this procedure was established, and appears to have been necessary.<sup>191</sup>

Upon remand, the district judge informed counsel that he did not think that *Eisen IV*<sup>192</sup> required him to disregard the mandate of the court of appeals to go forward with the test case. Counsel believed that the suit had been reduced to an individual action on behalf of *Katz*. With the case in that posture, it was settled and dismissed with prejudice.<sup>193</sup> One commentator has suggested that the district court's combination of *Eisen* and *Katz* effectively reduced *Katz* to a denial of class action status.<sup>194</sup> In any event, the Third Circuit held that the test case procedure would be superior to 23(b)(3) class action certification.<sup>195</sup>

In *Ratner* the subject of test case procedure naturally arose because the liability aspect of that case was first determined favorably to the plaintiff.<sup>196</sup> The plaintiff argued that the test case procedure would "flood the Southern District with thousands of \$100 lawsuits."<sup>197</sup> However, Judge Frankel noted that no member of the class but *Ratner* had evinced any interest in the suit or had brought a similar suit elsewhere.<sup>198</sup> Thus neither the predicted flood of lawsuits nor the apathy of the class was deemed sufficient to justify class action certification.

The *Katz* court believed that *Carte Blanche* would prefer to be bound in favor of the entire class if it lost the test case,<sup>199</sup> but in *Ratner* the Chemical Bank pressed for and obtained a denial of class action status. No additional suits were brought and there was no appeal from the district court's decisions. These circumstances lend

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<sup>189</sup> *Id.* at 760-62.

<sup>190</sup> *Id.* at 758-59.

<sup>191</sup> *Id.* at 760.

<sup>192</sup> *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

<sup>193</sup> Letter from John H. Morgan to the author and others, November 22, 1974.

<sup>194</sup> Note, 88 HARV. L. REV. 825, 834 (1975).

<sup>195</sup> 496 F.2d at 762-63.

<sup>196</sup> *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270 (S.D. N.Y. 1971).

<sup>197</sup> Plaintiff's Memorandum in Support of Class Action 12, Case No. 69 Civ. 4195, (S.D. N.Y. Dec. 6, 1971).

<sup>198</sup> *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 413-14 (S.D. N.Y. 1972).

<sup>199</sup> See 496 F.2d at 757, 760, 762.

support to the view that defendants will rarely consent to the test case procedure.<sup>200</sup>

It is too soon to venture an opinion whether *Eisen IV* will foreclose the test case approach.<sup>201</sup> However, in this context it is suggested that the Supreme Court's decision in *American Pipe & Construction Co. v. Utah*<sup>202</sup> requires class certification prior to a determination of liability on the merits, unless the defendant consents to the test case procedure.<sup>203</sup>

### VIII. CONCLUSIONS

The subjects of judicial economy and fairness to the parties are of first importance in determining whether a rule 23(b)(3) class action is superior to other available methods for the fair and efficient adjudication of a controversy under the Truth in Lending Act. Under the former law, such actions have caused heavy expenditures of judicial time, effort and expense in numerous cases.<sup>204</sup> There is reason to believe that similar expenditures will not be so prevalent under the amended law in view of (1) the provision for recovering actual damages, (2) the limitation of the civil penalties to individual actions, and (3) the restrictions upon the total fund that may be recovered for the "class as a whole" in class actions. Also, there may be some chance that the courts will view recovery under subdivision (2)(B)<sup>205</sup> of the amended Act in the same light as the Second Circuit saw fluid class recovery, namely "illegal, inadmissible as a solution to the problems of class actions and wholly improper."<sup>206</sup>

The incentives offered by the Truth in Lending Act to litigants and their lawyers have been increased by the amendments. The benefits to class members who may be involved in a rule 23(b)(3) action are considerably less than they were. While the specter of the horrendous consequences to a defendant has been removed by the amendments, there are substantial factors favorable to individual litigants still remaining. It is to be borne in mind that the rule requires

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<sup>200</sup> Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1423-24 (1974).

<sup>201</sup> See *supra* note 194, at 832-33.

<sup>202</sup> 414 U.S. 538, 547 (1974).

<sup>203</sup> Cf. *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353 (7th Cir. 1975).

<sup>204</sup> See *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7, 16 (D.D.C. 1973).

<sup>205</sup> 15 U.S.C. § 1640(a)(2)(B) (1974).

<sup>206</sup> *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973).

*superiority*, not mere *adequacy* of the class action.<sup>207</sup> Rule 23 does not say that the class vehicle must be “as good as” or “almost as good as” some other available method. The word chosen was “superior”.<sup>208</sup> In view of that requirement, the class action must be considered to be an unlikely method to obtain judicial economy and fairness in most Truth in Lending cases. The exceptions may be expected to appear if courts will limit the application of rule 23(b)(3) on a case by case basis, within sound judicial discretion, to situations offering sensible results.<sup>209</sup>

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<sup>207</sup> Linn v. Target Stores, Inc., 61 F.R.D. 469, 472 (D. Minn. 1973).

<sup>208</sup> Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 454 (M.D. Ga. 1975).

<sup>209</sup> Wilcox v. Commerce Bank, 474 F.2d 336, 349 (10th Cir. 1973).